No. 19975

IN THE

# United States Court of Appeals For the Ninth Circuit

FRANK M. GRAVEN,
Plaintiff,

v.

ARTHUR PASA,
Defendant,

*Appellants,*

USIBELLI COAL MINES, INC., *Intervenor,*
GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., a corporation, and POTOMAC INSURANCE COMPANY, a corporation, d/b/a GENERAL ACCIDENT GROUP,
Third Party Defendants,
*Appellees.*

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES L. POWELL, *Judge*

## REPLY BRIEF OF APPELLANTS

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## REPLY BRIEF OF APPELLANTS

### COUNTER-STATEMENT OF THE CASE

The appellees make certain statements in their counter-statement of the case which cannot stand unchallenged, since they are not accurate, and since they may be of considerable importance. Thus we find at page 3 of the appellees' brief: "Fred Savage, the general superintendent, was the one who was personally present and in direct charge, supervision and control of the mining opera-

tions of the company, including its underground operation —not the defendant Pasa." This is just not true. On pages 54 and 55 R.P., we find the following:

"Q. But as foreman you were the only one over at Suntrana?

"A. Yes.

"Q. Physically over there continuously?

"A. Yes.

"Q. You were located over there?

"A. Yes.

"Q. And when Savage was in charge at Usibelli of the strip pit you would be in charge there?

"A. Yes, that's right.

"Q. And you stated that you saw Savage pretty often?

"A. Oh, just about every day.

"Q. Just about every day?

"A. Yes.

"Q. Then, how often would he come over; every day?

"A. Well, he ate supper there every day and he might check the camp once every day and it all depended on the work, and he was down there and he was usually down there every night.

"Q. Let's see if I understand you. He would eat supper with you every day.

"A. Well, not with me but at the camp.

"Q. And you would tell him what would be going on?

"A. Well, it was normally routine that we would talk and I would tell him what was going on.

"Q. And how long would he stay?

"A. Well, he would eat supper and listen to what was going on.

"Q. About one hour or so?

"A. One-half hour.

"Q. And that would be a regular thing every day?

"A. Yes, unless he missed his supper.

"Q. And you say, then, that he also inspected the mine about once a week?

"A. Yes, he would come around about once a week.

"Q. And he would actually go into the mine and into each of the rooms and inspect them?

"A. Yes.

"Q. And how long would that inspection last?

"A. I don't know.

"Q. Could you give me an approximation? Would it be eight hours or two hours or one hour?

"A. Well, I'd say from one hour to two hours."

Likewise, at page 65, R.P., we find the following:

"Q. Now, when he came down to see your operation and inspect it did he give specific orders about it and specific directions about what should be done and what should not be done?

"A. Well, not too much. I think after a person mines about thirty some odd years you have a very good knowledge of what is going on, both mining and mechanically, both.

"Q. During this period of time were you ever relieved from your duties?

"A. No. Not until that—after where I went into the shop.

"Q. Well, yes, but I am talking about before or at the time of the accident?

"A. No. No."

These portions of the record, along with the record cited previously in appellants' brief, at pages 14 through 17, clearly indicate that Savage was not the one who was personally present and in direct charge, supervision, and control of the underground operation. The record is clear that it was Pasa who was in control and that the only supervision Savage had was as the general manager of the company.

Later, on page 3 of the appellees' brief, it is stated that "Pasa was but one of the foremen at the operation, and that other foremen were employed *there*, . . ." (emphasis ours).

The record is clear that the other foremen were not employed at the Suntrana site and had no equivalent duties to Pasa and that Pasa was the person in charge of the Suntrana site (R.P. pp. 83-84, and other portions of the record).

The statement is made by appellees' counsel that Pasa did not hire or *fire* the miners who worked there. On page 66, R.P., it is clear that on occasion he did fire certain people.

Finally, at page 7 of the appellees' brief, appellees' counsel states that,

> "Defendant Pasa had no managerial responsibility for the affairs of the coal mining company generally. . ."

But it is quite clear from the record that he did have managerial responsibility for the affairs of the Suntrana site generally, and this is pointed out in the excerpts cited in the appellants' opening brief, and at pages 63 through 70, and page 85, R.P.

## ARGUMENT IN REPLY

The appellees cite three cases arising out of Louisiana in support of their position. All three are distinguishable, and in any event merely relate only the position of one jurisdiction. The cases of *Bruce v. Travelers Insurance Co.*, 266 F.2d 780 (1959), 5th Cir., and *Employers Liability Insurance Corp.*, 150 So.2d 595 (La. 1963) are cases in which foremen were held not to be executive officers. However, the evidence therein indicated that these foremen did not have the responsibilities and duties of Pasa and further that they were not in charge of an entire real estate complex, where people worked and lived, and where there was an entire mine and community which was separate from the other operations of the company. Furthermore these two cases make no holding, nor do they in any way indicate any dictum, as to whether or not such a person is a "proprietor with respect to real estate management."

In the one cited case which does attempt to make a decision with respect as to "proprietorship with respect to real estate management," *Golman v. Fidelity & Casualty Co. of New York, Inc.*, 146 So.2d 461 (La. 1962), the Louisiana court held that a boy who collected the greens

fees and rented the clubs at a golf course was not a proprietor with respect to real estate management. This decision is correct, but it is so readily distinguishable as to require no further comment. This boy was nowhere near in the position of defendant Pasa nor had he any of the responsibilities or duties of Pasa. That cause cannot be authority for anything involved in the cause before this court.

In any event, the authorities cited by appellees are Louisiana authorities. The appellants have cited what they believe to be applicable authorities from the state of California. In such a circumstance, this court is left with a choice. This court may exercise its unfettered deliberation with respect to determining the course that it will take. It is to be pointed out that California is a Ninth Circuit jurisdiction and Louisiana is not. It is also to be pointed out that, as will be argued subsequently herein, reasonable judgment and policy dictate a decision in favor of the appellants' position — that Pasa should be considered an insured under the terms of the insurance contract here in question.

In their opening brief, the appellants pointed out the settled rules of construction of insurance contracts; that such are to be strictly construed against the company issuing them and in favor of the party claiming coverage. This was such familiar law that appellants did not deem it necessary to cite authority in support thereof. However, the appellees, in their brief, have attempted to restrict this rule of law, and have stated, without any

authority, that the rule is that the insurance contracts are only construed liberally in favor of those who are parties to the contract and who have paid premiums. The appellees made the argument that since appellants cannot qualify as parties to the contract, then they are in no position to urge for liberal construction. The appellees' position is just not the law and never has been the law. In researching this question, appellants' counsel has nowhere been able to find the restrictive phrasing urged by the appellees, and strongly believes there is no authority to support appellees' position. In fact, in a leading Washington case on the construction of insurance contracts, *Doke v. United Pacific Insurance Company,* 15 Wn.2d 536, 131 P.2d 436 (1942), the main question is whether or not the injured person was "in the line of duty" when he was injured. If he were not in the line of duty, then he was not covered; if he was in the line of duty, then he was covered by the insurance contract. In that case the person who was seeking to be covered by the insurance policy was clearly not a party to the contract and had not paid any premium in order to obtain the benefit of the coverage provided. Nevertheless the Supreme Court of Washington held,

> "That being true, the meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning, because the insurer, and not the insured is the author of the instrument. *Kane v. Order of United Commercial Travellers,* 3 Wn.2d 355, P.2d 1036; *Zinn v. Equitable Life Insurance Company,* 6 Wn. 2d 379, 107 P.2d 921."

As was stated, without restriction or limitation, in *Guaranty Trust Co. v. Continental Life Ins. Co.*, 159 Wash. 683, 294 Pac. 585:

> "There is another principle applying to contracts of insurance to the effect that, if they are so drawn as to require interpretation and fairly susceptible of two different conclusions, the one will be adopted most favorable to the insured; and will be liberally construed in favor of the object to be accomplished, and conditions and provisions therein will be strictly construed against the insurer, as they are issued upon printed forms prepared by experts at the instance of the insurer, in the preparation of which the insured has no voice. *Algoe v. Pacific Mutual Life Ins. Co.*, 91 Wash. 324, 157 Pac. 993, *Fenton v. Poston*, 114 Wash. 217, 195 Pac. 31, *Thompson v. Brotherhood of American Yeomen*, 130 Wash. 179, 226 Pac. 498, *Continental Life Ins. Co. v. Wells*, 38 Ga. 99, 142 S.E. 900, *Mathews v. Modern Woodmen of America*, 236 Mo. 326, 139 S.W. 151."

The United States Court of Appeals, in cases arising in Washington, has held similarly. In *Thames & Mersey Marine Insurance Co. v. Pacific Creosoting Co.*, 223 Fed. 561 (1914), it was held that the language of exceptions, warranties and conditions in insurance policies must be clear, and any doubt in the meaning thereof will be construed against the insurer. In *Reserve Life Insurance Co. v. Marr*, 254 F.2d 289, cert. den. 358 U.S. 839, 79 S.Ct. 63, 3 L.Ed.2d 74, it was held that a policy will be liberally construed in favor of the object to be accomplished, and the conditions and provisions thereof will be strictly construed against the insurer.

In 29 Am. Jur., Section 258, page 640, it is held that,

> "The general rule applicable to contracts generally, that a written agreement should, in case of doubt as to the meaning thereof, be interpreted against the party who has drawn it, is very frequently applied to policies of insurance and constitutes an important rule of instruction in such respect, in view of the fact that ordinarily, and in practically all cases, it is the insurer who furnishes or prepares the policies used to embody the insurance contracts."

Later in the section the following is pointed out:

> "For instance, it has been stated that where the provisions of a policy of insurance are reasonably susceptible of two constructions consistent with the object of the obligation, one favorable to the insured and the other favorable to the insurer, the former will be adopted; . . ."

In Section 264 the following is found:

> "The rule is well established that if conditions, exceptions and exemptions from, or limitations of, the liability of an insurer are not expressed plainly and without ambiguity, they will be construed strictly against the insurer. . . . The reason for this rule is that the insurance company selected the phrase to be construed and should have specifically excluded the risk if there was any doubt."

It is thus clear that the rules of construction of insurance contracts are without limitation and should apply in favor of the appellants in this case. The fact is that the language is, if not entirely favorable to the insured, at least unclear, and the construction of the contract should be in favor of the appellants herein.

What is the real purpose of this insurance contract?

Clearly it must be to protect Usibelli Coal Mines, Inc., the corporation, from financial loss arising from the acts and decisions of the persons who have supervisory responsibilities and who are the real and active participants and decision-makers in the conduct of the corporation, and the corporation's holdings in real property. If the insurance contract were to be given a more restricted meaning, then the need for the insurance contract would be greatly minimized, if not negatived. After all, of the named officers in the corporation, only the president, Emil Usibelli, was an active participant in the conduct of the corporation. The vice-president and secretary were merely named persons who had no active participation. Likewise, of the named directors, only Emil Usibelli had any active participation in the corporation.

The nature of the modern corporation is such that directors, stockholders and other officers, with individual exceptions, do not have any active participation in the affairs of the corporation. Thus the insurance contract which attempts protection of the decision-makers in the corporation must reasonably intend to refer to the real and active decision-makers and supervisors and must not be restricted to wives, figureheads and prominent names who happen to hold an office or a share of stock. It appears most reasonable that this court, with a choice to make, both as to the law involved and as to the interpretation of the insurance contract, should look to the real intention of liability insurance in this circumstance and hold that the defendant Pasa was covered by such insurance.

It is certainly clear that Pasa exercised independent judgment, that he was, and this is admitted by all parties, a supervisory employee (see the Answers to Interrogatories and R.P. 59, 60, 66, 68) and that he acted, with respect to the Suntrana site, as an executive officer and proprietor.

Finally the appellants wish to make it clear that they have no argument with the Findings of Fact made by the trial court, and thus the appellees' argument that Rule 52 (a) of the Federal Rules of Civil Procedure requires this court to accept any Findings of Fact of the trial court unless those findings are clearly erroneous is in no way harmful to the appellants' case. Appellants would urge that, accepting the Findings as made, nevertheless the Conclusions of Law and the Judgment are, on the basis of the Findings of Fact and the record, not apt, and are indeed erroneous.

## CONCLUSION

For all the reasons set forth herein and in appellants' opening brief, it is respectfully urged that this court should hold as a matter of law that the defendant Pasa was covered by the policy of insurance herein involved on the date in question in his position with Usibelli Coal Mines, Inc.

Respectfully submitted,

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## CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

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*Of Counsel for Appellants*